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# MAINTAINING COMPETENCY AMONG LAWYERS: HOW FAR HAVE WE COME?

JERRI D. GILBREATH\*

Chief Justice Burger's comments regarding incompetence among lawyers have focused attention upon the need for a mechanism for assuring attorney competency.<sup>1</sup> For the first time, the public is demanding to know the credentials of the professionals who are responsible for handling some of life's most important occurrences, such as purchasing a home, incorporating a business or securing a divorce.

## MECHANISMS FOR ASSURING COMPETENCY

Virtually everyone who has studied the subject recognizes the need for some mechanism to ensure attorney competence.<sup>2</sup> The present methods of self-regulation used in the legal profession have been attacked as ineffective.<sup>3</sup> The widespread public dissatisfaction with lawyers and the legal profession's worsening reputation are cited as testaments to the ineffectiveness of the self-regulatory methods presently used by most bar associations to maintain professional competency and to discipline those members who have been negligent or who have violated the canons of ethics.<sup>4</sup> In fact, an American Bar Association committee, established in 1967 and chaired by former Associate Justice of the United States Supreme Court,

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<sup>1</sup> N.Y. Times, Feb. 13, 1978, § 2, at 9, col. 1; see Burger, *Annual Report on the State of the Judiciary*, 49 PENN. B.A.Q. 212, 215-20 (1978); *President Carter's Attack on Lawyers, President Spann's Response, and Chief Justice Burger's Remarks*, 64 A.B.A.J. 840 (1978).

<sup>2</sup> See, e.g., Leete & Loeb, *Continuing Legal Education—Should It Be Compulsory?*, 27 J. LEGAL EDUC. 110 (1975); Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence*, 1974 UTAH L. REV. 463; Petry, *Professional Competence and Legal Specialization*, 50 ST. JOHN'S L. REV. 561 (1976); Sheils & Agrest, *Back to School*, NEWSWEEK, Jan. 12, 1976, at 71; Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574 (1975).

<sup>3</sup> See, e.g., Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement*, 95 A.B.A. REP. 783, 797-804 (1970) [hereinafter cited as *Disciplinary Enforcement*]; Comment, *The Bar and Watergate: Conversation with Chesterfield Smith*, 1 HASTINGS L.Q. 31, 37-38 (1972).

<sup>4</sup> Kavanaugh, *Performance Evaluation, Education, and Testing: Alternatives to Punishment in Professional Regulation*, 30 U. MIAMI L. REV. 953, 954-55 (1976).

Thomas C. Clark, noted that a substantial percentage of complaints made against attorneys involved incompetence.<sup>5</sup>

Currently, there are five mechanisms under consideration in the United States which might help achieve continuous competency among members of the bar: 1) periodic reexamination; 2) specialization; 3) peer review; 4) certification; and 5) mandatory continuing legal education.<sup>6</sup> Because it seems to be the most popular method,<sup>7</sup> this article will focus on mandatory continuing legal education (MCLE). However, to acquaint the reader with the other four mechanisms, each will be discussed briefly.

The first mechanism, periodic reexamination, can be divided into three groups: periodic reexamination of all practicing attorneys as a prerequisite to relicensing; periodic reexamination in conjunction with specialization plans wherein successful completion of examinations by an attorney would be required prior to recognition as a specialist in a particular area of law; and periodic voluntary examinations which would provide successful examinees with some form of recognition, such as a plaque or certificate.<sup>8</sup> Among lawyers, periodic examination is probably the least popular alternative for the internal policing of the profession.<sup>9</sup>

A second method suggested for maintaining attorney competence is the recognition of attorney specialization, contingent upon one of the following: successful completion of continuing legal education (CLE) courses in a specialized area; limiting the law practice to the areas of specialization; or sworn affidavits that the lawyer has spent a specified minimum number of years practicing in one particular area of the law or varying combinations of the above.<sup>10</sup> Recognition of specialization by attorneys is now used in such states as California, Texas, New Mexico and Florida.<sup>11</sup>

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<sup>5</sup> See *Disciplinary Enforcement*, *supra* note 3. Although this special committee was created to gather and study information relating to the formal discipline of lawyers for unethical and illegal conduct, one bar association official admitted that the majority of complaints from clients involved incompetence. See *id.* at 783.

<sup>6</sup> See generally Comment, *Once You're In: Maintaining Competence in the Bar*, 56 NEB. L. REV. 676 (1977).

<sup>7</sup> See note 31 and accompanying text *infra*.

<sup>8</sup> Comment, *Once You're In: Maintaining Competence in the Bar*, 56 NEB. L. REV. 676, 678-79 (1977). See also Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064 (1975).

<sup>9</sup> Leete & Loeb, *Continuing Legal Education—Should It Be Compulsory?*, 27 J. LEGAL EDUC. 110 (1975). In a survey of 400 attorneys, three-quarters of those responding opposed periodic reexamination as an alternative to mandatory continuing education. Lawyers fear that such tests are not reliable measures of practical skills and, moreover, attorneys who specialize would have difficulty with a general examination. *Id.* at 114. See also Comment, *Once You're In: Maintaining Competence in the Bar*, 56 NEB. L. REV. 676, 678-79 (1977).

<sup>10</sup> Comment, *Once You're In: Maintaining Competence in the Bar*, 56 NEB. L. REV. 676, 682 (1977).

<sup>11</sup> See CAL. BUS. & PROF. CODE § 6076 (rule 2-106) (West Supp. 1978); INTEGRATION R. FLA. B. art. XXI (West Supp. Pam. 1968-1978); BY-LAWS INTEGRATION R. FLA. B. art. XVII (West Supp. Pam. 1968-1978); N.M. STAT. ANN. § 18-5-2 (rule 2-105) (Supp. 1975); TEX. ST. B. R. DR 2-105 (Vernon 1973). Georgia and Tennessee are also close to implementing specialization plans. Letters from CLE authorities in referenced states in response to questionnaire (May

A third method under discussion is the use of peer review programs which call for attorneys to evaluate the performance and competency of their fellow lawyers.<sup>12</sup> As a whole, the legal profession has been unreceptive to proposed peer review programs modeled after those used by the medical and accounting professions.<sup>13</sup> As yet, no state has adopted such a plan.<sup>14</sup> Another proposed method, related to peer review, is "selective monitoring of competence."<sup>15</sup> Such a program contemplates a periodic review of lawyers by those who are best able to evaluate lawyer performance: clients, judges, court clerks or other attorneys, and a bar-operated agency which would monitor attorney performance. Those observing the incompetent rendition of services would report to this agency for appropriate investigation and remedial action. The agency would be authorized to investigate the grievance and prescribe any remedial measure, such as attendance at an educational program coupled with subsequent examination to assure that the remedial action achieved the desired level of competence.<sup>16</sup> In conjunction with this program, revocation of the license to practice pending completion of the remedial measures also has been suggested.<sup>17</sup>

Certification, the fourth method proposed, is a hybrid plan involving specialization in certain areas of practice combined with periodic reexami-

12, 1978). See generally Fromson & Miller, *Specialty Certification, Designation, or Identification for The Practicing Lawyer—A Look at Midstream*, 50 ST. JOHN'S L. REV. 550 (1976).

<sup>12</sup> Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064, 1064 (1975). A model peer-review program would entail the establishment of volunteer panels of lawyers who would evaluate the quality of legal services provided by participating individuals. The local bar associations would promulgate standards, criteria and procedures for review. *Id.* at 1066. For an additional discussion by Professor Wolkin in this area, see Wolkin, *On Improving the Quality of Lawyering*, 50 ST. JOHN'S L. REV. 523, 535-38 (1976).

<sup>13</sup> For a detailed discussion of model peer-review programs in the medical and accounting professions, see Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence*, 1974 UTAH L. REV. 463, 466-73.

<sup>14</sup> Comment, *Once You're In: Maintaining Competence in the Bar*, 56 NEB. L. REV. 676, 687 (1977).

<sup>15</sup> Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064 (1975); Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574, 577-78 (1975).

<sup>16</sup> Professor Wolkin suggests that a voluntary selective monitoring system has its foundation in Canon 6 of the Code of Professional Responsibility. Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064, 1064 (1975). The ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 simply states: "A lawyer should represent a client competently." Furthermore, the ethical considerations and disciplinary rules under Canon 6 indicate that an attorney's responsibility is to maintain his own competence, as well as the competence of other members of the bar. For example, Ethical Consideration 6-2 provides in part:

A lawyer is aided in attaining and maintaining competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession.

See also Disciplinary Rule 6-101; Ethical Consideration 6-4.

<sup>17</sup> Wolkin, *More on a Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 1064, 1064 (1975).

nation and mandatory CLE. Certification is currently being used in California and Texas.<sup>18</sup>

Aside from the five alternatives discussed above, voluntary CLE has been used extensively in the United States in an attempt to combat lawyer incompetence.<sup>19</sup> A system of voluntary CLE was the method selected by 56% of attorneys surveyed in 1976 to maintain attorney competency.<sup>20</sup> The obvious drawback, however, is that such programs are *voluntary*. It would seem, therefore, that those attorneys who would benefit most from CLE would not participate.<sup>21</sup> As a result, some states have chosen to initiate a program of mandatory continuing legal education.<sup>22</sup> In addition, two federal district courts within the second circuit, the Northern District of New York<sup>23</sup> and the District of Vermont,<sup>24</sup> have adopted rules of admission in an effort to improve advocacy and to ensure a minimum level of competency among lawyers practicing in those courts. Lawyers seeking to practice before these courts either must take certain courses in or after law school, or the applicants must present to the bar admissions committee proof that they have acquired the equivalent knowledge.<sup>25</sup>

Before discussing some of the aspects of the six types of MCLE plans being used in the United States, it would be helpful to briefly review the history of voluntary CLE in the United States.

#### HISTORY OF VOLUNTARY CONTINUING LEGAL EDUCATION

Without question, a program unique in the historical development of CLE was begun in Dallas, Texas, in 1936. At that time, virtually every lawyer in the Dallas area had to attend a Saturday morning docket call in Dallas. Under the Dallas CLE Plan, docket call was delayed each Saturday so that a guest speaker could deliver a 30-minute CLE lecture. These weekly CLE lectures were then published by the Dallas Bar Association. Twenty-one months after these CLE lectures began, membership in the

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<sup>18</sup> Comment, *Once You're In: Maintaining Competence in the Bar*, 56 NEB. L. REV. 676, 685-86 (1977); see CAL. BUS. & PROF. CODE § 6076 (rule 2-106) (1975).

<sup>19</sup> Friday, *Continuing Legal Education: Historical Background, Recent Developments, and The Future*, 50 ST. JOHN'S L. REV. 502 (1976).

<sup>20</sup> Unterberger, *The Lawyer's 1976 View of Continuing Legal Education*, 22 PRAC. LAW. 71, 92-93 (1976). In Unterberger's survey, lawyers were asked to select one of the proposed methods of assuring competency among members of the bar. Statistics revealed that 55.8% chose expanded voluntary CLE programs, 20.9% chose a selective monitoring program, 26.2% favored periodic license renewal contingent upon completion of a mandatory CLE program, 3.9% selected periodic license renewal based on a written examination, and 3.9% chose other methods of periodic license renewal. *Id.*

<sup>21</sup> Unterberger's survey also revealed a "high degree of correlation between the reading of legal publications and attendance at C.L.E. programs." Unterberger, *supra* note 20, at 91. Thus, it is apparent that the most well-read attorneys are taking advantage of CLE offerings.

<sup>22</sup> To date, six jurisdictions have adopted MCLE plans: Iowa, Minnesota, North Dakota, Washington, Wisconsin and Wyoming. See app. I *infra*.

<sup>23</sup> U.S. DIST. CT. N.D.N.Y. R. 2.

<sup>24</sup> U.S. DIST. CT. D. VT. R. 12.

<sup>25</sup> See notes 23-24 and accompanying text *supra*.

Dallas Bar Association rose from 420 to over 800 attorneys.

The first CLE program, however, was conducted in 1916 when the Association of the Bar of the City of New York sponsored lectures on "practical aspects of practicing law."<sup>26</sup> Even then CLE was recognized as an important means of maintaining competence in the profession. The program's importance was underscored by the rapid spread of the idea itself. The Lawyers Chautauqua in Iowa in 1924 was the first CLE program to attempt to meet the needs of the practicing lawyer in rural areas. It was sponsored by the District Bar Association of the Fourteenth Judicial District of Iowa and combined education with an old-fashioned picnic, complete with live entertainment.<sup>27</sup>

As interest in CLE grew, each area of the United States adapted the CLE idea to meet its own needs and particular way of life. Before the inception of Practicing Law Institute (PLI) courses, CLE programs were sponsored largely by state and local bar associations.<sup>28</sup> In 1933, the Practicing Law Institute began to provide CLE courses in New York. A product of Harold P. Seligson, the PLI offered courses of particular interest to recent law school graduates who lacked the knowledge that only experience could provide.<sup>29</sup> By 1937, the American Bar Association became involved in CLE<sup>30</sup> and subsequently, aided by events such as the new Federal Rules of Civil Procedure and the return of World War II veterans,<sup>31</sup> the American Bar Association and the PLI joined to provide CLE courses across the United States.<sup>32</sup> Interest in CLE continued to spread and, in 1958, the

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<sup>26</sup> C. MORELAND, *PROFESSIONAL EDUCATION OF THE BAR: GROWTH AND PERSPECTIVES* 3 (1972) [hereinafter cited as MORELAND]. The series of lectures, delivered in the spring of 1916 by "especially qualified lawyers," dealt with the subjects of collateral trusts and debenture indentures, foreclosure of railroad mortgages, reorganization of corporations, the Sherman antitrust laws, the Clayton Act and the Public Service Commissions. ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION REGULATION* vii-ix (1917). The lectures "were intended for the practical guidance of practicing lawyers, already familiar with the general principles and rules of practice, in accomplishing specific things in the best and most efficacious ways." *Id.* at viii. The lectures stirred much interest and participation in the program, *id.* at vii, and except for a brief interlude during World War I, continued until the early 1930's. MORELAND, *supra*, at 4; Friday, *Continuing Legal Education: Historical Background, Recent Developments, and the Future*, 50 ST. JOHN'S L. REV. 502, 502 (1976).

<sup>27</sup> MORELAND, *supra* note 26, at 5-6.

<sup>28</sup> *Id.* at 11.

<sup>29</sup> *Id.* (citing Seligson, *Post-Admission Education for Lawyers*, 22 A.B.A.J. 231, 231-33 (1936)).

<sup>30</sup> At its annual meeting, the ABA resolved to "aid practicing lawyers in their attempt systematically to extend their field of legal knowledge after admission to the bar . . . [and to cooperate] with state and local bar associations [to] afford opportunities for supplementing the legal education and training of its members." Section of Legal Education and Admissions to the Bar, *Report*, 65 A.B.A. REP. 342, 345 (1940).

<sup>31</sup> See Friday, *Continuing Legal Education: Historical Background, Recent Developments, and the Future*, 50 ST. JOHN'S L. REV. 502, 503-05 (1976).

<sup>32</sup> MORELAND, *supra* note 26, at 21 & 35. By 1945, "refresher courses" had been organized with the assistance of the Practicing Law Institute in 24 states and planned in 10 others.

American Bar Association Committee on Continuing Legal Education joined with the American Law Institute to invite leaders of bar associations from each state to Arden House in Harriman, New York. Later known as Arden House I, its purpose was to foster the exchange of information concerning successful CLE plans and to encourage state bar development of a professional staff for CLE programs in each state.<sup>33</sup> Arden House I was successful and states thereafter created administrative positions for implementing CLE programs.<sup>34</sup> The quality of the CLE programs, however, remained of concern and Arden House II was held in 1963 to address that issue.<sup>35</sup> Since that time, state and local bar associations have continued to upgrade the quality of their CLE programs and presently over two-thirds of the states have voluntary CLE programs.<sup>36</sup>

#### MANDATORY CONTINUING LEGAL EDUCATION IN THE UNITED STATES

Those states which have initiated an MCLE plan are Minnesota, Iowa, Washington, Wisconsin, North Dakota and Wyoming.<sup>37</sup> Similarities among these plans outweigh differences.<sup>38</sup> Salient features of these six plans are noted and briefly discussed in this section.

Generally, under each of the MCLE plans, credit is given only for approved MCLE courses.<sup>39</sup> In order for a course or lecture to qualify for

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*Proceedings of the House of Delegates*, 70 A.B.A. REP. 101, 123 (1945).

<sup>33</sup> The first Arden House Conference reached five basic conclusions:

- (1) that the organized bar has the primary obligation to make continuing legal education available to the profession and that at the national level the responsibility rests with the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association; (2) that in the last analysis responsibility for continuing legal education in each state rests with the organized bar of the state; (3) that an adequately compensated professional staff is essential to develop and carry out an effective state program; (4) that increased emphasis must be placed upon education for professional responsibility; and (5) that law schools have an important contribution to make to the continuing education of the bar.

ARDEN HOUSE II: TOWARD EXCELLENCE IN CONTINUING LEGAL EDUCATION, REPORT ON THE SECOND NATIONAL CONFERENCE ON THE CONTINUING EDUCATION OF THE BAR xxii-xxiii (1964).

<sup>34</sup> As a result of Arden House I, State Administrators of Continuing Legal Education were appointed in 23 states. *Id.* at ix.

<sup>35</sup> The Arden House II conferees discussed four major subject areas, each bearing upon the goals "of improving the quality and increasing participation in continuing legal education." *Id.* at xxiii. The four subjects discussed were: "The improvement of [e]ducational [l]iterature, [p]rograms, and [t]echniques . . . ; [m]eeting the [e]ducational [n]eeds of the [n]ewly [a]dmitted [l]awyer . . . ; [i]mplementation of [e]ducation for [p]rofessional [r]esponsibility . . . ; [m]aking [m]ore [e]ffective the [o]rganization and [f]inancing of [c]ontinuing [l]egal [e]ducation." *Id.* at xxiii-xxvii.

<sup>36</sup> Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574, 575 (1975).

<sup>37</sup> See, e.g., IOWA CODE ANN. § 610 app. Rule 123 (West Supp. 1978-1979); MINN. SUP. CT. (CLE) R. 1-7 (West Supp. Pam. 1968-1978); WASH. CT. (APR) R. 11 (1978); WIS. STAT. ANN. § 256 app. (CLE) Rules 1-13 (West Supp. 1978-1979); Information on file with author from MCLE authority in each MCLE jurisdiction regarding each of the MCLE plans (June-July 1978) [hereinafter cited as Information on file with author]; app. I *infra*.

<sup>38</sup> See app. I *infra*.

<sup>39</sup> Information on file with author, *supra* note 37.

credit, strict standards, established by the respective plans, must be satisfied.<sup>40</sup> An efficient vehicle for informing the bar of accredited courses is exemplified by the Minnesota plan wherein a list of accredited courses is published in the official magazine of the state bar association.<sup>41</sup> Minnesota practitioners also may earn credit by teaching an MCLE course, but no credit is given for other legal teaching nor is credit given for the publication of articles in legal journals. The Minnesota plan also seems to be more receptive than the other plans to in-house programs presented by a law firm or governmental agency for its own employees.<sup>42</sup>

The Wyoming plan is one of the most flexible with regard to earning MCLE credits. The Wyoming Board is specifically empowered to allow credit for such activities as legal writing and publications, part-time teaching in a law school, or delivering a paper or speech at a professional meeting attended primarily by lawyers or law students.<sup>43</sup> The Wyoming plan also provides that 3 credit-hours will be given for each hour spent lecturing at approved CLE courses.<sup>44</sup> A proposal pending in Wisconsin would allow credit for publication of articles in legal journals as well.<sup>45</sup> Five of the six plans seem to have adopted the "dirty plate rule," a rule which rejects credit for luncheon or dinner speeches.<sup>46</sup> Minnesota takes a flexible attitude on this matter and has in several instances deviated from the rule. Wisconsin, in rejecting the "dirty plate rule," specifically allows credit for luncheon and dinner speeches as long as the speech is at least 50 minutes in length and written materials are provided to those persons attending.<sup>47</sup>

All MCLE plans except North Dakota and Wyoming reject outright the concept of receiving credit for self-study.<sup>48</sup> The Wyoming plan, while withholding blanket approval for self-study credits, does not outrightly reject the idea since the Wyoming Board is specifically authorized to give credit for self-study whenever justified.<sup>49</sup> The proposed Missouri MCLE plan would recognize self-study by allowing lawyers to obtain credits for

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<sup>40</sup> *Id.*; see, e.g., MINN. SUP. CT. (CLE) R. 101 (West Supp. Pam. 1968-1978), which sets forth "standards for course approval and credit for attendance."

<sup>41</sup> Heidenreich, *Toward a More Competent Bar*, 60 JUD. 21, 24 n.11 (1976).

<sup>42</sup> *Id.* at 26; Information on file with author, *supra* note 37.

<sup>43</sup> *Court Approves Mandatory Rules*, 1977 WYO. LAW. 4 (December).

<sup>44</sup> *Id.*

<sup>45</sup> Interview with Erica Moser, Director, Board of Attorneys Professional Competence, Wisconsin State Bar (July 1978).

<sup>46</sup> See, e.g., MINN. SUP. CT. (CLE) R. 101(f), which states: "Ordinarily credit will not be given for speeches given at luncheons or banquets."

<sup>47</sup> Heidenreich, *Toward a More Competent Bar*, 60 JUD. 21, 25 (1976); Information on file with author, *supra* note 37.

<sup>48</sup> Information on file with author, *supra* note 37; see, e.g., MINN. SUP. CT. (CLE) R. 101(e) (Supp. Pam. 1968-1978). But see WIS. STAT. ANN. § 256 app. (CLE) Rule 7(5) (West Supp. 1978-1979), which provides: "Initially only formal course work will be approved by the Board for continuing legal education credit. However, the Board recognizes the value of other learning modes, including independent study." *Id.*

<sup>49</sup> Information on file with author, *supra* note 37.



self-study to satisfy part of the total 20-hours-per-year requirement.<sup>50</sup> The Missouri plan would require a lawyer to attend an annual 5-hour "current developments" seminar which would focus upon current state and federal decisions and statutes.<sup>51</sup> In addition, the lawyer would choose among numerous state and local bar association CLE programs for 5 hours of additional credit. The final 10 hours of credit, under the proposed Missouri plan, could be acquired through attendance at formal classroom, seminar or workshop programs, or through self-study. While recognizing the value of self-study, the proposed plan does provide that any of the time to be satisfied by self-study must be in a ratio of 3 hours of self-study to 1 hour of the more formal, structured classroom format.<sup>52</sup> Similarly, the North Dakota plan limits self-study credits to one-third of the required course work during each 3-year period.<sup>53</sup>

In each of the six MCLE plans, the administering board or commission has the responsibility for assuring compliance with the plans' requirements, approving courses for credit and keeping records of credit hours earned by lawyers.<sup>54</sup> The administrative boards of Washington, Minnesota, Iowa and Wisconsin all include at least one lay member,<sup>55</sup> while the North Dakota board is composed of attorneys only. Minnesota is alone in requiring that at least one board member be a member of the judiciary.<sup>56</sup> Each of the six plans provide that the board members can serve a maximum of two 3-year terms.<sup>57</sup>

Uniformly, the plans are funded by the participating lawyers. Methods of payment entail collection of a flat per-capita annual fee<sup>58</sup> plus registration fees for each course, which may cost as much as \$150 per year. Obviously, the costs quoted do not include opportunity costs lost to the lawyer who is away from his office and unable to practice while attending the courses.<sup>59</sup>

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<sup>50</sup> CLE—Continuing Legal Education—The Missouri Plan, 33 Mo. B.J. 147 (1976).

<sup>51</sup> *Id.* The Colorado proposal contemplates presentation of seminars throughout the state via video tape with a moderator and live discussions. *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Information on file with author, *supra* note 37.

<sup>54</sup> See IOWA CODE ANN. § 610 app. Rule 123.2 (West Supp. 1978-1979); MINN. SUP. CT. (CLE) R. 2 (West Supp. Pam. 1968-1978); WASH. CT. (APR) R. 11.4 (1978); WIS. STAT. ANN. § 256 app. (CLE) Rule 2 (West Supp. 1978-1979); Information on file with author, *supra* note 37.

<sup>55</sup> See IOWA CODE ANN. § 610 app. Rule 123.2 (West Supp. 1978-1979) (of 12 member commission, 2 laypersons are appointed by court); MINN. SUP. CT. (CLE) R. 2 (West Supp. Pam. 1968-1978) (3 of 12 members may be laypersons); WASH. CT. (APR) R. 11.3 (1978) (one layperson in 7-member panel); WIS. STAT. ANN. § 256 app. (CLE) Rule 2 (West Supp. 1978-1979) (of 9 members, 4 members are chosen from the judiciary, law school faculty, or the public). The Wyoming plan also provides for at least one lay member. Information on file with author, *supra* note 37.

<sup>56</sup> MINN. SUP. CT. (CLE) R. 2 (West Supp. Pam. 1968-1978), requires one member to be a district judge.

<sup>57</sup> Information on file with author, *supra* note 37.

<sup>58</sup> The average annual assessment is approximately \$15. Information on file with author, *supra* note 37.

<sup>59</sup> Wolkin, *On Improving the Quality of Lawyering*, 50 ST. JOHN'S L. REV. 523, 542 (1976);

A marked divergence among the six plans emerges from the stated exemptions to the plans. For example, judges are excluded from the regular MCLE course work in Wisconsin<sup>60</sup> and excluded from all MCLE requirements in North Dakota.<sup>61</sup> Under the Wisconsin plan, however, members of the judiciary are required to take 60 credits of specially prepared courses during each 6-year term.<sup>62</sup> Wisconsin's and Washington's exemption of new bar admittees<sup>63</sup> is a curious feature since, historically, one of the fundamental purposes of CLE was to "bridge the gap between law school theory and practical experience."<sup>64</sup> Additionally, the lawyer electing a "restricted status" under the Minnesota plan is entitled to practice law without meeting the MCLE requirements as long as he represents only a limited number of close relatives.<sup>65</sup> The lawyer who files for "inactive" status in Iowa<sup>66</sup> and Wisconsin,<sup>67</sup> however, may not practice law at all.<sup>68</sup> It is interesting to note that Wisconsin has the only plan which allows an exemption from MCLE based on the lawyer's advanced age.<sup>69</sup> The Minnesota,<sup>70</sup> Iowa<sup>71</sup> and Washington<sup>72</sup> plans permit an attorney to accumulate credit hours and carry them over to later years which may have the effect of exempting older attorneys from the MCLE requirements. The Wisconsin and Minnesota plans have no such provision.<sup>73</sup>

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Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574, 578 (1975); Information on file with author, *supra* note 37.

<sup>60</sup> WIS. STAT. ANN. § 256 app. (CLE) Rule 3 (West Supp. 1978-1979). "The program of continuing legal education as herein provided shall not extend to judges since they are covered by their own continuing education program." *Id.*; see note 63 *infra*.

<sup>61</sup> Information on file with author, *supra* note 37.

<sup>62</sup> WIS. STAT. ANN. § 256 app. Rule 2 (West Supp. 1978-1979) (Continuing Education for Wisconsin's Judiciary).

<sup>63</sup> WASH. CT. (APR) R. 11.2(B) (1978); WIS. STAT. ANN. § 256 app. (CLE) Rule 3(B)(1) (West Supp. 1978-1979). The Wyoming plan also exempts new bar admittees. Information on file with author, *supra* note 37.

<sup>64</sup> Friday, *Continuing Legal Education: Historical Background, Recent Developments, and the Future*, 50 ST. JOHN'S L. REV. 502, 503 (1976).

<sup>65</sup> MINN. SUP. CT. (CLE) R. 3 (West Supp. Pam. 1968-1978), which states: "An attorney in restricted status . . . may not represent any person in any legal matter or proceedings within the State . . . other than himself except a spouse, son, daughter, father, mother, brother, sister, father-in-law, mother-in-law, brother-in-law, or sister-in-law." *Id.* Members of the judiciary, state court officers, attorneys in any governmental unit, or legal counsel for a full-time employer are not eligible for restricted status. *Id.*

<sup>66</sup> IOWA CODE ANN. § 610 app. Rule 123.7 (West Supp. 1978-1979).

<sup>67</sup> WIS. STAT. ANN. § 256 app. (CLE) Rules 3(B)(2), 5 (West Supp. 1978-1979).

<sup>68</sup> Wyoming and North Dakota also prohibit inactive members from practicing law, as well as exempting them from MCLE requirements. Information on file with author, *supra* note 37.

<sup>69</sup> WIS. STAT. ANN. § 256 app. (CLE) Rule 3(A) (West Supp. 1978-1979).

<sup>70</sup> MINN. SUP. CT. (CLE) R. 101(i), (j) (West Supp. Pam. 1968-1978).

<sup>71</sup> IOWA CODE ANN. § 610 app. Rule 123.3 (West Supp. 1978-1979).

<sup>72</sup> WASH. CT. (APR) R. 11.2, 11.4 (1978).

<sup>73</sup> Information on file with author, *supra* note 37. See also Survey Report, *MCLE: The Rule Against Perpetuity—A Survey Research and Comparative Approach*, 3 OHIO N.L. REV. 915 (1976).

In order to aid in the institution of the MCLE plan in Minnesota, which requires 45 hours to be earned every 3 years, a "phasing-in" technique was utilized. Under the phase-in process, the lawyers in the state were divided into three groups:<sup>74</sup> one group was required to earn 15 hours of CLE credits by the end of the first year after implementation of the plan; a second group was to earn 30 hours of CLE credit by the end of the second year after implementation; and the third group was required to complete the full 45 hours of CLE credits by the end of the third year after implementation of the plan. In this way, Minnesota was able to avoid a great deal of the confusion which might have resulted had there been an onrush of lawyers clamouring for space in CLE courses.<sup>75</sup> Similarly, Wyoming required only 10 hours of CLE during the first year of the plan's existence and 15 CLE hours thereafter in order to lessen the initial impact of MCLE and to facilitate smooth implementation of the MCLE plan.<sup>76</sup>

All six plans require each lawyer to submit a written report to the supervisory board verifying that he has earned the requisite number of CLE credits.<sup>77</sup> If the lawyer fails to file or meet the MCLE requirements, disciplinary action may be instituted which in turn could result in the loss of the privilege to practice law.<sup>78</sup> In addition, the supervisory boards of each state uniformly have been granted power to suspend or waive MCLE requirements in hardship cases or whenever justified.<sup>79</sup>

The majority of the jurisdictions, twenty-one states, are presently studying MCLE.<sup>80</sup> Six states are not presently studying MCLE nor is action anticipated in the near future.<sup>81</sup> Georgia, Tennessee and Florida have focused upon the adoption and operation of their respective specialization plans and have suspended any serious consideration of MCLE.<sup>82</sup> While six states have already enacted MCLE programs and others are awaiting final approval of a formal MCLE plan already submitted to their respective state supreme courts, only one state, Colorado, is presently close to completing its MCLE plan. The Colorado plan, if ultimately approved, will

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<sup>74</sup> Heidenreich, *Toward a More Competent Bar*, 60 JUD. 21, 22 (1976).

<sup>75</sup> *Id.* at 23.

<sup>76</sup> *Court Approves Mandatory Rules*, 1977 WYO. LAW. 4 (December).

<sup>77</sup> See Survey Report, *MCLE: The Rule Against Perpetuity—A Survey Research and Comparative Approach*, 3 OHIO N.L. REV. 915 (1976); Information on file with author, *supra* note 37.

<sup>78</sup> Information on file with author, *supra* note 37.

<sup>79</sup> Heidenreich, *Toward a More Competent Bar*, 60 JUD. 21, 26 (1976); Information on file with author, *supra* note 37.

<sup>80</sup> The states where MCLE plans are currently under study are: Alabama, Alaska, Arizona, Connecticut, Delaware, Hawaii, Illinois, Indiana, Massachusetts, Montana, Nevada, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, Vermont and West Virginia. See app. I *infra*.

<sup>81</sup> The states of Arkansas, Louisiana, Maine, Mississippi, New Jersey, and Oregon, and the District of Columbia have not, at this time, initiated study of MCLE programs. Information on file with author, *supra* note 37.

<sup>82</sup> Letters from the CLE authorities from the states of Florida, Georgia and Tennessee (June 1978).

exempt only lawyers who elect "inactive" status, as will be defined by the Colorado CLE committee.<sup>83</sup> Pennsylvania, too, is currently formulating its MCLE plan as the Pennsylvania State Bar has recently resolved to recommend MCLE to the Pennsylvania Superior Court.<sup>84</sup>

As noted above, several states—Idaho, Kansas, Nebraska, Missouri and South Carolina—are awaiting approval of an MCLE plan by their respective state supreme courts.<sup>85</sup> Although the Nebraska State Bar recommended to the Supreme Court of Nebraska that MCLE be effective in that state on January 1, 1978, the Supreme Court delayed its decision on MCLE for 1 year and has once more required the circulation of the proposed rule among Nebraska lawyers.<sup>86</sup> South Carolina awaits approval of a plan which integrates a specialization plan with MCLE. The South Carolina MCLE plan requires lawyers to earn 12 credit-hours per year. However, those lawyers who are not involved in the "active" practice of law or who have been admitted to practice in South Carolina for at least 30 years are exempt from the MCLE requirements. In addition, lawyers who have been certified by the Specialization Advisory Board as a "specialist" are likewise exempt. In order to be designated by the board as a "specialist" in a particular area the lawyer must: submit names of five other lawyers practicing in the area of specialty who can attest to the applicant's competency in the area; be engaged in the practice of law for a minimum of 5 years; demonstrate to the Board a substantial involvement in the specialty field for the 3 to 5 years immediately preceding application for certification; and either successfully complete an approved program of instruction in the specialty area or successfully complete an examination in the specialty area.<sup>87</sup>

The proposed Missouri plan requires 20 hours of CLE per year, recognizes self-study, and requires attendance at a 5-hour current developments seminar each year. Exemptions from the current-developments requirement are to be strictly construed, but exemptions from the remainder of the program will be more liberally granted upon a showing of illness, infirmity or special extenuating circumstances.<sup>88</sup> The Missouri plan also provides a flexible rule for those attorneys who have been practicing for 50 years or more and who are 75 years or older. For those lawyers, self-study credits may be earned to satisfy ten of the twenty required annual credits.<sup>89</sup>

To date, six jurisdictions have rejected MCLE. The Maryland Court

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<sup>83</sup> Letter from Colorado CLE Director (June 1978).

<sup>84</sup> Letter from Pennsylvania CLE Director (June 1978).

<sup>85</sup> Letters from Idaho, Kansas, Nebraska, Missouri and South Carolina CLE authorities (June 1978).

<sup>86</sup> Letter from the Executive Director of Nebraska CLE, Inc. (June 1978).

<sup>87</sup> Letter from Director of CLE, South Carolina (June 1978).

<sup>88</sup> *CLE—Continuing Legal Education—The Missouri Plan*, 33 Mo. B.J. 197 (1976).

Although part of the Missouri CLE requirements are subject to liberal exemptions, an "extenuating circumstance" brought about by a flourishing law practice is specifically disallowed as an exemption. *Id.*

<sup>89</sup> *Id.*

of Appeals has indefinitely deferred action on MCLE.<sup>90</sup> The Supreme Court of New Mexico<sup>91</sup> and the Virginia Supreme Court of Appeals<sup>92</sup> have rejected plans submitted to them by their respective state bar associations. Both New Mexico and Virginia, however, are presently reworking their MCLE plans. Michigan and California have also rejected MCLE. California, the pioneer in specialization of lawyers, has dropped consideration of MCLE as have Michigan and Utah.<sup>93</sup> The Supreme Court of Utah, while deciding against MCLE at the present time, has nevertheless left the issue open for reconsideration in the future. Utah has now focused upon a voluntary CLE proposal similar to the voluntary certification plan presently in effect in Kentucky.<sup>94</sup>

Kentucky is the only state which has instituted a voluntary CLE plan in conjunction with a recognition program. The attorney who applies for the award must certify to the CLE Commission that he has attended at least 60 hours of approved CLE courses within a 3-year period. The award is valid for 3 years and attorneys may apply at any time after receiving the award, upon completion of the additional credits required for the next 3-year period, for an updated award certificate.<sup>95</sup>

#### PROBLEM AREAS OF MANDATORY PLANS

A discussion of the status of MCLE in the United States cannot be complete without some reference to the obstacles which the MCLE plans now face. It is frequently argued that mere attendance at CLE courses will not guarantee improved lawyer competence.<sup>96</sup> Additionally, it seems unnecessary to require CLE of all attorneys regardless of their level of skill or competence.<sup>97</sup>

Still another unresolved controversy is that of reciprocity for course work within MCLE jurisdictions. At present, it is possible, for example, that a lawyer may be given 6 hours of credit under the Wisconsin plan while earning only 5 hours of credit for the same course under the plan of a neighboring state. The likelihood that this problem will occur might increase as more states adopt MCLE plans. The need for creating a set of uniform standards for MCLE credits is thus clear.<sup>98</sup> In addition, with the increase in demand for CLE courses, those who provide such services

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<sup>90</sup> Letter from Maryland Institute for Continuing Professional Education of Lawyers, Inc. (May 22, 1978).

<sup>91</sup> Letter from the Assistant Director of the New Mexico CLE authority (June 1978).

<sup>92</sup> Interview with James N. Woodson, Director of Public Information, Virginia State Bar (July 1978).

<sup>93</sup> Letter from California, Michigan and Utah CLE authorities (June - July 1978).

<sup>94</sup> Interview with Mr. Dean W. Sheffield, Executive Secretary of Utah State Bar (July 1978).

<sup>95</sup> Letter from John K. Hickey, Director of CLE in Kentucky (May 1978).

<sup>96</sup> Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574, 575 (1975).

<sup>97</sup> *Id.* at 576.

<sup>98</sup> Survey Report, *MCLE: The Rule Against Perpetuity—A Survey Research and Comparative Approach*, 3 OHIO N.L. REV. 915, 1010 (1976).

should have uniform guidelines to assist them in preparing courses that will meet the standards of all MCLE plans.<sup>99</sup>

A major problem as yet untouched by any MCLE plan now effective in the United States is the absence of any mechanism for evaluating lawyer competency *after* the MCLE experience. Without such a mechanism, how can we know whether or not MCLE is accomplishing its goal?<sup>100</sup> What is the real goal of MCLE? Is it merely an empty promise to the consumer of legal services that his lawyer has been present at the requisite number of courses — a ploy to regain some of the public's lost confidence in the legal profession? It is certain that this underlies to some extent the spread of MCLE programs, but one would hope that the real goal is improving the quality of "lawyering" in the United States. To date, MCLE is the most popular vehicle for achieving this goal.

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<sup>99</sup> Heindenreich, *Toward a More Competent Bar*, 60 JUD. 21, 27 (1976).

<sup>100</sup> Wolkin, *A Better Way to Keep Lawyers Competent*, 61 A.B.A.J. 574, 576 (1975).



## PRESENT STATUS OF MCLE IN THE UNITED STATES

Jurisdiction	MCLE Effective	CLE Voluntary	MCLE Program Awaiting Approval	MCLE Recom- mended	MCLE Proposal Near Completion	MCLE Presently Under Study	No Action Anticipated In Future	MCLE Rejected	Speciali- zation Program In Effect	Nearing Specializa- tion Plan
Kentucky		X								
Louisiana							X			
Maine							X			
Maryland								X		
Massachusetts						X				
Michigan								X		
Minnesota	X									
Mississippi										
Missouri			X				X			
Montana					X					
Nebraska			X							
Nevada					X					
New Hampshire					X					
New Jersey							X			
New Mexico										
New York						X				
North Carolina						X				





MANDATORY CONTINUING LEGAL EDUCATION PLANS  
EFFECTIVE IN THE UNITED STATES

Jurisdiction	Implementa- tion	CLE Hours Required Per Year	Attorneys Exempted From CLE Requirements	Administering Agency	Approved Methods Of Earning CLE Credits
Iowa	January 1976	15/year	Iowa lawyers not engaged in the prac- tice of law may apply for exemp- tion	Board composed of 12 mem- bers (10 lawyers, 2 non- lawyers) Term: Not more than two 3 yr. terms	1 hr. = 60 classroom minutes. Credit allowed for attendance at or teaching approved CLE courses. In-house programs may be accredited by Board, credit given members of Iowa Bar for audit of courses at any ABA accredited law school <i>Specifically Disallowed:</i> Self-Study, Credits, legal writing & publications, credit for law school teaching. Carte blanche approval of certain sponsor organizations (ABA, PLI, etc.) rather than course by course approval
Minnesota	July 1975	45/3 years	Lawyers Electing re- stricted status under MCLE Rules	Board composed of 12 members (1 judge, 8 law- yers, 3 nonlawyers) Term: Not more than two 3 yr. terms	1 hr. = 60 classroom minutes. Credit allowed only for attendance at or teaching approved CLE courses; In-house Programs may be accredited by Board; Luncheon Speakers may be accredited by Board; <i>Specifically Disallowed:</i> Self-Study credit; publications credit, law professors credit. Courses approved on course by course basis only.

MANDATORY CONTINUING LEGAL EDUCATION PLANS  
EFFECTIVE IN THE UNITED STATES

Jurisdiction	Implementa- tion	CLE Hours Required Per Year	Attorneys Exempted From CLE Requirements	Administering Agency	Approved Methods Of Earning CLE Credits
North Dakota	January 1977	45/3 years	Lawyers electing in- active status under MCLE rules, Judicial members of the North Dakota Bar	Board composed of 7 mem- bers (all lawyers) Term: Not more than two 3 yr. terms	1 hr. = 60 classroom minutes. Credit allowed only for attendance at or teaching approved CLE courses. Plan gives carte blanche approval of courses offered by the following: State Bar ass'ns; Accredited law schools, ABA, ALI, PLI; Recognition given CLE courses approved by other CLE Jurisdictions. Self-Study is credited (not to exceed 1/3 required course work for any 3 yr. period).
Washington	January 1977	15/year	New Bar Ad- mittees, Law- yers electing inactive status within the Washing- ton Bar	Board composed of 7 members (6 lawyers, 1 nonlawyer) Term: Not more than two 3 yr. terms	1 hr. = 60 classroom minutes. Credit allowed for attendance at or teaching approved CLE courses. <i>Specifically</i> <i>Disallowed</i> : Speeches presented at and attendance at luncheons and banquets. Carte blanche approval of major legal organizations (eg. State Bar, ABA, PLI, ALI) Self-Study credit disallowed.

MANDATORY CONTINUING LEGAL EDUCATION PLANS  
EFFECTIVE IN THE UNITED STATES

Jurisdiction	Implementa- tion	CLE Hours Required Per Year	Attorneys Exempted From CLE Requirements	Administering Agency	Approved Methods Of Earning CLE Credits
Wisconsin	January 1977	15/year	New Bar Ad- mittees. Wis- consin Law- yers not en- gaged in the practice of law; Inactive & Judicial members of the State Bar-Separate MCLE re- quirement; Lawyers over 69	Board composed of 9 members (8 lawyers, 1 nonlawyer) Term: Not more than two 3 yr. terms	1 hr. = 60 classroom minutes. Credit allowed for attendance at or teaching approved MCLE courses; Credit allowed for professors who teach at ABA approved law schools; Proposed Rule would allow credit for legal writing & publications in legal journals; Credit allowed for luncheon & dinner speakers if speech is 50 minutes minimum. Carte blanche approval of major legal organi- zations (eg. State Bar, ALI, PLLI, ABA). All speeches, programs must provide written materials to participants. <i>Specifically Disallowed: Self-Study credit.</i>

Jurisdiction	Implementa- tion	CLE Hours Required Per Year	Attorneys Exempted From CLE Requirements	Administering Agency	Approved Methods Of Earning CLE Credits
Wyoming	March 1978	10/year- 1978-79 15/year- Thereafter	Inactive members of the Wyoming bar. New Bar Admittees	Board composed of 9 members (6 lawyers, 3 non-lawyers) Term: Not more than two 3 yr. terms	1 hr. = 60 classroom minutes. Credit allowed for attendance at or teaching approved CLE courses. Board specifically empowered to approve writing & publish- ing articles in legal journals, part-time teaching by a practitioner in an ABA approved law school, delivering a paper or speech at a professional meeting attended by lawyers; Self-Study credits not specifically rejected. Carte blanche approval of courses offered by the following: State Bar of Wyoming or any other State, ABA, Trial Lawyers Ass'n, PLI, etc.

